

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)	
)	
Review of the Regulatory Requirements)	CC Docket No. 01-337
for Incumbent LEC Broadband)	
Telecommunications Services)	

Comments of DIRECTV Broadband, Inc.

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SUMMARY

The Commission seeks comment on SBC's petition for reduced federal oversight of SBC's sale of Last Mile Connectivity. SBC's petition asks the Commission to eliminate one of the few meaningful checks against anti-competitive conduct by the ILECs in providing high-speed digital connections across the Last Mile, a bottleneck resource that ILECs utilize to favor their affiliated Broadband ISPs over competitors. The public must rely on the appropriate management of Last Mile facilities by the ILECs if those facilities will continue to serve as a delivery path for high quality, innovative, and accessible Broadband Services. Grant of SBC's request would make the Last Mile telecommunications infrastructure a permanent bottleneck to competition, innovation, quality and affordability in the market for Broadband Services.

DIRECTV Broadband urges the Commission to recognize the essential defect in the analysis at the heart of SBC's request. Although SBC asks the Commission to end oversight of the purchase and sale of Last Mile Connectivity, SBC's analysis relies solely on a discussion of the market dynamics for *retail* Broadband Services, where the regulated side of SBC's business is neither a buyer or seller and where the tariff in question does not operate. The product and market that the Commission *does* regulate and where an analysis must be undertaken, is for *wholesale* DSL connectivity sold by SBC under Federal tariff. The buyers consist solely of Broadband ISPs like DIRECTV Broadband, Earthlink, SBC's ISP affiliates such as Prodigy and PacBell Internet, and others all of which utilize this Last Mile Connectivity as one of several necessary components in providing retail broadband products and services to consumers, such as high speed Internet access. As the Commission itself noted in its recent *Broadband NPRM*, a fundamental difference exists between Last Mile Connectivity, which the Commission calls "the transmission component" of retail broadband services, and the various consumer Broadband

Services that use this transmission component.¹ Transport and Broadband Services have different buyers, different sellers, different marketing, different sales channels, different cost components and different pricing.

In the regulated wholesale market in which SBC seeks relief, the lack of choice among suppliers is so obvious that SBC cannot afford to direct the Commission's attention to the relevant facts.

SBC as a seller so dominates this market for Last Mile connectivity that it can consistently act toward purchasers, in this case Broadband ISPs, as if they have no meaningful opportunity to use another Last Mile provider in any given region. The Commission must reject SBC's petition, based on both the lack of relevant information provided in SBC's petition, and on the basis that no meaningful competition exists in the relevant market for Last Mile Connectivity such that the Commission's oversight of SBC may have become unnecessary due to the operation of normal market forces.

¹ Notice of Proposed Rulemaking, In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, February 14, 2002, ¶ 30.

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DIRECTV Broadband, Inc. (“DIRECTV Broadband”) submits these comments in response to the Commission’s notice of proposed rulemaking concerning the appropriate and necessary level of regulation of broadband telecommunications services provided by incumbent local exchange carriers (“ILECs”).² For the reasons discussed below, the Commission should maintain dominant carrier regulation of ILEC broadband telecommunications services.

DIRECTV Broadband is a broadband services provider (“Broadband Services Provider”) that offers retail high-speed DSL-based broadband services such as Internet access, e-mail, web-hosting, multiple computer networking services, virus and security services, and, in the future, other interactive and consumer-focused broadband services and applications. DIRECTV Broadband provides these services to over 100,000 residential customers nationwide in 146 Metropolitan Areas and is one of the largest non-ILEC affiliated Broadband Services Providers in the country. DIRECTV Broadband provides service by means of its own nationwide broadband network combined with last-mile wholesale xDSL connectivity and transport (together, “DSL Connectivity”) purchased from ILECs, including BellSouth, SBC, Qwest and

² *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Notice of Proposed Rulemaking*, CC Docket No. 01-337, FCC 01-360, (rel. December 20, 2001) (“NPRM”).

Verizon, and, where possible, from CLECs such as MCI WorldCom. DIRECTV Broadband is a subsidiary of DIRECTV, Inc., a leading provider of competitive video services to residential consumers nationwide.

As one of the few independent companies that purchases Last Mile Connectivity from SBC across its 13 state region, and having been a purchaser of Last Mile Connectivity from SBC since 1997, DIRECTV Broadband believes it can provide insight into the dynamics between buyer and seller of SBC tariffed Last Mile product, the way those dynamics have changed as CLEC competitors left the Last Mile marketplace, and the key facts that should help the Commission answer the question whether SBC is a “Dominant Carrier” for the purposes of the above-captioned inquiry.

I. The Relevant Market in this Proceeding is the Wholesale Access Market, Not the Retail Services Market

As the Commission initiates this study of the nature and scope of the broadband market, the first thing it should recognize is that the ILECs seek to blur virtually all distinction between two very different broadband markets, the wholesale market for Last Mile Connectivity and the retail market for Broadband Services. Presciently, the Notice asks whether the Commission’s analysis in this proceeding should “distinguish between retail markets and wholesale markets.”³ In fact, because ILEC online affiliates typically sell retail broadband only as an unregulated bundled information service, these markets are *already* differently regulated. In the wholesale market, which should be the subject of this proceeding, the RBOCs are the dominant providers in their regions of wholesale Last Mile Connectivity to ISPs and other Broadband Services Providers. As dominant carriers, the RBOCs are required to tariff the wholesale service that they sell to DIRECTV Broadband and other Broadband Services Providers. Continued dominant

³ NPRM at 24.

carrier regulation is essential to ensure that Broadband Services Providers will continue to have nondiscriminatory access to consumers, thereby assuring competition and consumer choice. By contrast, the RBOCs have never submitted their retail broadband information services to the Commission's dominant carrier regulations, on the premise that such services are unregulated because they are bundled with information services.⁴ Therefore, the ILECs' retail broadband services are today not tariffed, and not subject to rate or cost support regulations.

It is therefore remarkable that virtually all of the data relied upon by SBC in its petition requesting nondominant treatment,⁵ which the Commission has incorporated into the record of this proceeding, pertains only to the retail broadband market. The SBC Petition discusses the preferences of end-user consumers,⁶ the elasticity decisions made by retail consumers, and the competition that SBC's retail broadband service faces from cable modem offerings. None of these indicia are relevant to the question of whether SBC is subject to competition in the wholesale broadband market. SBC mistakenly cites this evidence to support its request for regulatory relief not in the retail market, in which its online affiliate already enjoys relative deregulation and pricing flexibility, but in the entirely different wholesale Last Mile Connectivity market. The tariff that SBC seeks to shield from dominant carrier regulation is its Last Mile Connectivity tariff; its ISP affiliates have never tariffed the retail broadband information service that competes with cable modem services. Therefore, the bulk of the information upon which SBC asks the Commission to base its decision, essentially offered to prove SBC has no market power and that the Commission can confidently eliminate its oversight

⁴ The appropriate regulation of these services is the subject of the Commission's inquiry in the recent *Broadband NPRM*.

⁵ *In the Matter of SBC Petition for Expedited Ruling that it is Non-Dominant in its Provision of Advanced Services and for Forbearance from Dominant Carrier Regulation of Those Services*, Petition (filed Oct. 3, 2001) ("SBC Non-Dominance Petition").

⁶ SBC Non-Dominance Petition, Declaration of Robert W. Crandall and J. Gregory Sidak, at ¶ 36.

role without detriment to the public, is a red herring that is simply irrelevant to the Commission's consideration of any change in SBC's dominant carrier status.

The market for Last Mile Connectivity is significantly different from the market for retail Broadband Services and should continue to be evaluated and regulated separately. The SBC Petition's only apparent reference to the crucial distinction between these two markets is an oblique footnote in a supporting affidavit contending that a distinction between SBC's role in the wholesale market and its online affiliate's role in the retail Broadband Services is "irrelevant."⁷ The Affidavit seems to contend that if SBC's unregulated affiliate lacks market power in the retail market, the regulated wireline company cannot or would not exert anti-competitive behavior in favor of the online affiliate in the Last Mile Connectivity market. SBC's history of anti-competitive conduct on many fronts makes that a thin premise on which to rely. History aside, SBC's reasoning also fails because it evaluates only the regulated carrier's ability to injure *retail* consumers in the *short-term*, and ignores the ability of the regulated wireline company to destroy intramodal xDSL competition between its online affiliate and other Broadband Services Providers. If unchecked by regulation, SBC and other ILECs in the same position would be fully capable of ensuring that only the ILEC-affiliated Broadband Services Provider in each region can succeed. As will be demonstrated below, ILECs have leveraged their dominant position in the wholesale access market to capture the vast majority of the retail xDSL-based information services market. Non-dominant classification of SBC's wholesale Last Mile Connectivity product would only make it easier for SBC to discriminate against unaffiliated Broadband Services Providers, and would provide no countervailing public interest benefit. For these

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Id. at footnote 51.

reasons, the relevant market evaluation for this proceeding is the degree of market power held by ILECs in the wholesale Last Mile Connectivity market.

II. The ILECs Remain Dominant in the Wholesale Broadband Market

The large ILECs continue to be the dominant suppliers in the wholesale Last Mile connectivity market, to a far greater extent than the retail high-speed Internet access market. The ILECs' dominance is nearly total in the xDSL access market, and remains pronounced even in a more widely-defined wholesale broadband access market that includes cable, satellite and any other modes of access. There are few, and sometimes no, reasonably substitutable wholesale services available to Broadband Services Providers. ILECs control virtually all of the wholesale DSL market, and alternative delivery media are not available to most independent Broadband Services Providers to a sufficient degree to allow them to wean themselves of dependence on the ILECs. In short, if Broadband Services Providers were unable to obtain wholesale broadband service from the ILECs, most would be shut out of the consumer broadband market altogether.

The ILECs control almost all of the wholesale residential DSL lines sold in their respective regions. A July 2001 study published by the School of Information Management and Systems at the University of California at Berkeley found that the RBOCs control 90% of the wholesale residential DSL market nationwide.⁸ SBC's own evidence estimates that it has 95% of the residential mass-market ADSL lines in its thirteen-state territory.⁹ The little competition that does exist is almost exclusively a result of the ILECs' obligation to provide UNEs to CLECs; however, the real-world wholesale xDSL access market data demonstrates that the ILECs continue to dominate this market, notwithstanding their unbundling obligations. None of

⁸ *New York Times*, August 6, 2001, at C1 "*Bell Companies Blamed for D.S.L.'s Woes*."

⁹ SBC Non-Dominance Petition, Declaration of Robert W. Crandall and J. Gregory Sidak, at ¶ 55. Although the Declaration postulates that ILECs control approximately 84% of the DSL lines, it recognizes that most CLEC lines serve business customers, and accordingly, estimates that SBC has 95% of the wholesale residential

these CLEC providers equal the ILEC DSL coverage in their region. It is also worth noting that the few CLECs that remain in the residential broadband market depend on the continued availability of UNEs and access to the ILEC network, which, although guaranteed by the Telecommunications Act of 1996, now apparently may be eliminated.¹⁰

Not only are CLEC providers scarce, but limited opportunities exist for most independent broadband services providers to obtain ubiquitous wholesale Last Mile connectivity from cable and satellite operators. Most incumbent cable operators severely restrict the number of BSPs that can obtain broadband access. In any case, cable broadband service is often not available to homes that can be reached by DSL. Only 1/3 of American homes can currently choose between wireline and cable broadband services. That means 2/3 of homes are stuck with monopoly access, if they have any access at all.¹¹

Neither satellite, fixed wireless, nor any other delivery media offer a viable alternative to Broadband Services Providers for ubiquitous access to the residential consumer market. While DIRECTV Broadband's parent, DIRECTV, offers access to unaffiliated Broadband Services Providers, satellite broadband remains in its infancy, reaching only a small percentage of the market and remaining more expensive to provision than DSL or cable modem service, and therefore cannot buffer national Broadband Services Providers from anti-competitive practices. The prospects for new alternative delivery mechanisms, such as fixed wireless, face long odds and tremendous barriers to entry. In particular, new entrants face high investment costs that typically would far exceed the costs incurred by the incumbents deploying DSL over the

DSL lines in its region.

¹⁰ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Notice of Proposed Rulemaking, CC Docket No. 02-33, FCC 02-42, released February 15, 2002 ("*Broadband NPRM*").

¹¹ McKinsey & Co. and J.P. Morgan H&Q, *Broadband 2001: A Comprehensive Analysis of Demand, Supply, Economics, and Industry Dynamics in the U.S. Broadband Market* (April 2001), at pp. 40-43.

relatively ubiquitous public telecommunications network. ILECs are able to achieve tremendous economies by using their legacy networks and their existing public rights-of-way for Last Mile Connectivity.

In summary, there are no viable ILEC alternatives to which DIRECTV Broadband or other Broadband Services Providers can turn in order to obtain ubiquitous wholesale broadband access services that approximates DSL connectivity provided over the public telecommunications network. No matter what market definitions or analytical standards are used to evaluate ILEC market power in the broadband telecommunications marketplace, it is clear that the ILECs remain dominant in the wholesale residential broadband market. While the state of the market alone provides sufficient basis to reject SBC's Petition, DIRECTV Broadband will demonstrate below that continued application of dominant carrier tariffing and *Computer III* unbundling regulations is needed, at a minimum, to preserve competition and protect consumer choice in the broadband market.

III. ILEC Conduct Demonstrates that ILECS Suppliers are the Dominant Providers for Last Mile Connectivity.

To measure whether dominant carrier regulation is needed in the wholesale broadband market, the critical inquiry is not the ability of the ILECs to raise prices by increasing their rivals' costs or by restricting their rivals' output. Indeed, in the wholesale DSL Connectivity market, the ILECs have no meaningful rivals. Dominant carrier regulation is needed not only to protect actual or potential rivals of the ILECs, but to protect the ability of the consumers of the ILECs' wholesale DSL services, the Broadband Services Providers, to obtain broadband access service at reasonable and non-discriminatory rates, terms and conditions. If the ILECs are not

required to tariff wholesale broadband services subject to Commission review, they could dictate rates and terms to their Broadband Services Provider customers virtually at will.

Even while subject to dominant carrier regulation, the ILECs have leveraged their dominant position in the wholesale DSL Connectivity market into the retail broadband services market. Discrimination by ILECs in favor of their affiliated ISPs has enabled the ILECs, whose ISPs held only a single-digit percentage of the dial-up ISP market, to capture as much as 80% or more of the retail DSL-based ISP market.¹² Particularly as CLEC alternatives began to disappear, the ILECs, to varying degrees, intensified their discriminatory and unreasonable treatment of independent Broadband Services Providers, as described below, through (1) inflated, monopoly wholesale pricing; (2) discriminatory provisioning and operational support; (3) unnecessary and inefficient interconnection requirements; and (4) planned network limitations that would reduce the quality of the broadband services and suppress Voice over IP services that would compete with staple ILEC voice offerings. None of these anticompetitive measures represent the behavior that would be expected from a supplier seeking to satisfy its wholesale customers in a competitive market. Instead, these actions reflect the ILECs' confidence that they can dictate rates and terms to their captive Broadband Services Provider customers. Where DIRECTV Broadband has access to alternative suppliers, it has rejected ILEC service in favor of CLEC offerings; unfortunately, this option is becoming increasingly scarce.

First, the ILECs are able to, and in some cases have, set their wholesale rates at levels so close to retail market prices so as to preclude the ability of independent Broadband Services Providers to be profitable. In 2001, SBC, Verizon and BellSouth raised their wholesale DSL

¹² SBC Investor Briefing, "Strong Growth in Data, Wireless and Long-Distance Highlights SBC's First-Quarter Results (April 23, 2001), at 4) (indicating that "more than 80% of [SBC's DSL] customer base obtains Internet access service directly from an SBC or affiliate"), http://www.sbc.com/Investor/Financial/Earning_Info/docs/1Q_IB_FINAL.pdf (viewed March 1, 2002).

rates by approximately 15%,¹³ even though the costs of providing DSL are rapidly declining. SBC has boasted of a 25% decline in DSL subscriber acquisition costs since late 2000 and predicts further expense reductions due to declining equipment costs and operational efficiencies.¹⁴ Rising prices during a period of declining wholesale cost is a classic indication of a healthy monopoly.

When wholesale rates are inflated, even if the ILEC's ISP affiliate "pays" the same tariffed rates as other ISPs, the paper transactions between the ILEC affiliates merely represents a shifting of accounting entries from one pocket to another. These ILEC ISPs' profitability are measured not based on their own accounting but on the overall impact on the accounts of their parent companies. In its petition, SBC's discussion of cross-subsidization focuses only on the retail market, and its ability to set retail prices below cost.¹⁵ In the wholesale market, however, cross-subsidization is a very real and readily viable strategy for the ILECs and their ISP affiliates. ILECs need only price the wholesale rate too high, and make up for this rate to its own ISP affiliate by accepting lower or no earnings from its retail information services broadband offering. Even if an ILEC is not resorting to outright cross-subsidization, its ISP affiliate receives the benefit of the ILECs' brand name and advertising, customer support, and other joint costs. Therefore, the Commission should devote careful attention to the relationship between an ILEC's rates for wholesale DSL service and the retail rates that the ILEC's ISP affiliate charges end-users to ensure that ILECs are not engaging in a price squeeze of non-affiliated ISPs. To

¹³ SBC Advanced Solutions, Inc., Tariff F.C.C. No. 1, pp. 60-69 (eff. Sept. 10, 2001).

¹⁴ SBC Investor Briefing, "Second-Quarter Diluted Earnings Per Share Increases by 8.9% with Focus on Disciplined Financial Management, Growth Drivers (July 25, 2001) at 5 ("SBC continues to improve the economics of DSL. Acquisition costs have declined by more than 25 percent since the fourth quarter of 2000 due to modem cost reductions and operational improvements." http://www.sbc.com/Investor/Financial/Earning_Info/docs/2Q_IB_FINAL_Color.pdf (viewed March 1, 2002).

¹⁵ SBC Non-Dominance Petition at 9-10.

preserve the public interest, ILECs should continue to be required to tariff wholesale DSL services at regulated, cost-based prices supported by detailed cost information.

The ILECs' dominance of the wholesale broadband market also enables them to consign, with impunity, independent Broadband Services Providers to inferior provisioning, maintenance, and access to network information. Evidence of discrimination has been well documented to the Commission in various fora, including the comments filed by the California ISP Association in *the Computer III Remand*¹⁶ proceeding and the Application for Review filed by the Texas ISP Association against the new wholesale DSL tariff filed by SBC-ASI last Fall.¹⁷

While heightened enforcement of *Computer III* non-discrimination rules could perhaps remedy some instances of outright discrimination,¹⁸ nondiscrimination rules alone cannot protect the market when the ILECs' ISPs are effectively willing to be equally "disadvantaged" by a policy that helps their parents at the expense of all ISPs. For example, SBC and Verizon continue to require ISPs to purchase transport in each LATA even when they have obtained interLATA authority.¹⁹ In another example, some ILECs have initiated plans to unilaterally impose on ISPs a costly and counterproductive requirement to use Point-to-Point Protocol over Ethernet (PPPoE), a plan that is designed not to improve the product, but to protect the ILECs' voice services from competition from VOIP service, which is incompatible with PPPoE. Voice

¹⁶ Computer III Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Docket No. 95-20 and 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, CC Docket No. 98-10, Initial Comments of the California ISP Association, Inc. (April 16, 2001) at 6-30 (detailing numerous examples of BOCs providing preferential treatment to their affiliated ISPs).

¹⁷ *Petition and Application of the Texas Internet Service Provider Association* (filed September 13, 2001) (seeking investigation, suspension and rejection of SBC Advanced Solutions, Inc. Tariff F.C.C. No. 1).

¹⁸ Enforcement proceedings can take months or years to reach resolution and do not in many cases provide timely relief to all injured parties.

¹⁹ See e.g., *Application by Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc., and Verizon Select Services, Inc., for Authorization To Provide In-Region, InterLATA Services in the State of Vermont*, CC Docket No. 02-7, Comments of DIRECTV Broadband, Inc. at 2-4 (filed February 6, 2002).

over IP holds the promise not only of lower consumer prices, but also superior quality and innovative interactive options integrated with the consumer's video and Internet services. The ILECs' terms for interLATA transport and PPPoE should be included in their wholesale DSL tariffs. If, however, the ILECs' wholesale DSL services are classified as non-dominant, it would be far more difficult for Broadband Services Providers to challenge the rates and terms under which these services are offered.

SBC's behavior during the period in which its affiliate ASI offered wholesale DSL by contract rather than tariff offers a glimpse of what could be expected if the Commission grants non-dominant classification to the ILECs' wholesale xDSL services. During this period, SBC used strong-arm tactics to attempt to force its ISP customers, even those with existing contracts, to sign new contracts laced with a host of anticompetitive terms. For example, the CISPA documented to the California Public Utilities Commission that SBC threatened to disconnect ISPs that did not agree to a new contract that included unfavorable terms, such as the ISPs' consent to allow SBC to use its CPNI to market competing services to the ISP's customers, and to authorize SBC to degrade the performance of the service in order to allow SBC to overlay additional broadband services over DSL connections without the ISP's consent.

Last, and perhaps most indicative of the dominant position that the ILECs enjoy in the market for Last Mile Connectivity, SBC recently without notice unilaterally imposed a 70% speed reduction on a significant portion of the connections it provides to DIRECTV Broadband, without notice to the Commission or other Broadband Services Providers, without change in its tariff specifications for the product, and over DIRECTV Broadband's objection. DIRECTV Broadband was able to identify the change to SBC's product because of unique capabilities in the DIRECTV Broadband network, on which other Broadband Services Providers cannot rely

and, of which presumably SBC was not aware. It would be difficult to imagine such a development under market conditions where a seller of Last Mile Connectivity reasonably believes that a buyer has alternatives from which to choose.

If ILECs were permitted to file tariffs on one day's notice and without cost support information, Broadband Services Providers would be deprived of a meaningful opportunity to respond to proposed changes. Many tariff changes would inevitably take effect before being noticed, and ISPs would then be faced with an uphill challenge to provisions that would then carry a presumption of lawfulness. Far from promoting the ILECs' ability to compete against cable and other broadband services in the retail market, it would only cement the ILECs' ability to frustrate the ability of independent Broadband Services Providers from using xDSL to deliver their broadband services to consumers. For these reasons, grant of non-dominant status to the ILECs would harm both Broadband Services Providers and consumers and is therefore contrary to the public interest.

IV. Dominant Carrier Regulation of the ILECs' Wholesale xDSL Services Does Not Hamper the ILECs' Ability to Compete, Nor Does it Stifle Innovation or Investment

The Notice seeks comment on whether it should modify dominant carrier regulation of the ILECs' services, even if they remain dominant, in order to foster competition and the deployment of broadband services.²⁰ However, SBC severely exaggerates both the costs of dominant carrier regulation and the benefits of non-dominant classification when it asserts that dominant carrier regulation "impos[es] significant social costs," and that detariffing of competitively provided services would "promote[] competition and offers other significant benefits to consumers."²¹ The regulatory burden of filing cost support for its wholesale tariffs is

²⁰ NPRM at 21.

²¹ SBC Non-Dominance Petition at 74.

minimal since presumably SBC knows what its costs are, particularly in light of the fact that it asserts that its prices do not reflect cross-subsidies. Moreover, since the ILECs' wholesale xDSL service faces very little competition, and their ISPs customers cannot easily switch back and forth between providers, short delays in tariff effective dates have no material effect on the ILECs' ability to "compete" in the wholesale market which they dominate. Nor is there any evidence that the minimal administrative costs have any effect on the ILECs ability to compete in the retail market, or that dominant carrier regulation is the cause of any alleged head start that cable enjoys over DSL in the retail broadband market. While the ILECs complain about these regulations, they continue to add thousands of new broadband subscribers each quarter, and further entrench their dominance of the DSL market.²² Some federal regulations no doubt impose "significant social costs;" dominant carrier tariffing regulation, however, is clearly not one of them.

The most important way that the Commission can promote innovation and investment for broadband services, as well as efficient prices and provisioning standards, is to foster healthy competition. The most obvious example in the DSL arena is that, although DSL technology has been available for decades, the ILECs did not deploy it until after CLECs were able to introduce DSL services as a result of the Telecommunications Act of 1996. With DSL available first from CLECs and later from the ILECs, ISPs entered the DSL market and further added to the competitive dynamic, bringing additional creative energies to the DSL market, to the ultimate benefit of consumers. Continued innovation in DSL-based advanced services depends on the robust competition within a healthy group of non-affiliated retail providers.

²² SBC has boasted that DSL is a "strategic growth driver for the future," and doubled its xDSL subscribership between the third quarters of 2000 and 2001. See SBC Investor Briefing No. 226, http://www.sbc.com/Investor/Financial/Earning_Info/docs/2Q_IB_FINAL_Color.pdf, at 5 (July 25, 2001) and SBC Investor Briefing No. 227, http://www.sbc.com/Investor/Financial/Earning_Info/docs/

DIRECTV Broadband has made its own contribution that illustrates this benefit of competition. The initial rollout of DSL in 1997 suffered from unnecessary complexity and too much customer participation in installation. The ILECs required two \$175 truck rolls for every installation, and the compulsory disassembly of the customer's computer to install a Network Interface Card and manually reconfigure the PC's software. DIRECTV Broadband, at that time operating as Telocity, developed a self-installable gateway that eliminated the need for these costly, slow and intrusive truck-roll installations. Customers were required only to plug the gateway into a printer or USB port, insert a CD and enter their telephone number. The software established all settings, made the network connection, and in the event of a problem would even automatically notify Customer Service to call the customer during the installation. A year later, the ILECs duplicated some, but not all, of these features.

Broadband investment should not be measured only as the sum of money spent by common carriers to develop delivery mechanisms. Indeed, the real value of broadband pipes is in the services that will be delivered over them, and not in the infrastructure itself. While today many conflate broadband access with higher download speeds on the Internet, consumers and the Commission should expect broadband in the future to deliver much more than basic Internet access. Numerous subsequent innovations in DSL have been developed by competitive providers and only later adopted by ILECs, including multiple-PC support, firewalls, spam protection, and virus protection. However, if the Commission permits the ILECs to close their networks to unaffiliated broadband service providers, and access to consumers is thereby left to a small number of suppliers, investment in the development of innovative retail broadband *services* will be stifled.

Finally, while much of the public debate has focused on the percentage of Americans who still do not have access to broadband, an even greater percentage of Americans now have access but still do not subscribe. Recent studies show that many consumers are unwilling to pay more than \$25.00/month for high speed access and that this explains why less than 5% of U.S. households subscribe to it.²³ Thus, rather than dominant carrier regulation, a more genuine obstacle to broadband penetration in the consumer market is high price. ILECs have made xDSL more expensive (wholesale and retail) than it should be, and this is a key reason that xDSL penetration trails cable and that broadband penetration trails the Commission's expectations. Therefore, continued cost-based tariffing regulations remain necessary so that the Commission can evaluate whether the ILECs' wholesale xDSL rates are unreasonably high. Attacking the factors that have resulted in residential broadband being so expensive would be one of the most effective means within the Commission's power to stimulate the adoption of broadband in the consumer market.

V. Non-Dominant Classification Has No Bearing on *Computer II/III* Obligations

The *NPRM* asks whether a finding of non-dominance would have any effect on a carrier's *Computer II/III* obligations.²⁴ Those obligations require facilities-based carriers that provide information service to offer the transmission component of the information service separately pursuant to tariff and to acquire such transmission capacity for their own information service pursuant to tariff. Those obligations apply to all facilities-based carriers, both dominant ILECs and non-dominant CLECs. Therefore, a finding that ILECs are non-dominant in provision of

²³ "Broadband Success Requires More than Regulatory Clearance, Says Research," CLEC News, February 21, 2002, <http://www.clec-planet.com/news/02feb2002/18broadband.html> (viewed March 1, 2002).

²⁴ *NPRM* at ¶ 43.

broadband telecommunications services has no relevance to application of *Computer II/III* obligations.

Moreover, it should be plainly evident from these comments that the *Computer II/III* obligation of facilities-based carriers to make available to independent Broadband Services Providers on a nondiscriminatory basis the underlying transmission services they use for their own information services is the lifeblood of non-carrier Broadband Services Providers. Without the requirement on common carriers to make available broadband access services on reasonable and non-discriminatory rates, and if this transmission component were erroneously classified as subject only to the Commission's Title I authority, carriers would be free to discriminate against independent Broadband Services Providers in favor of their own operations. Nothing could be more inimical to the public interest or the continuation of a robust market for interstate communications services, including broadband. DIRECTV Broadband will address this issue more fully in response to *Broadband NPRM*.

VI. The Public Interest Objectives of Dominant Carrier Regulation are Undermined by the Commission's Liberal Grant of Tariff Special Permission Waivers

As established above, continued dominant carrier regulation of the ILECs' wholesale broadband access services is necessary to promote and protect the public's substantial interest in the availability of diverse choices of broadband services and service providers. However, this public interest objective is undermined completely when the ILECs are routinely able to obtain waivers of these regulations for every tariff revision, even for rate increases and substantial changes to the terms and quality of service.

After nearly two years of providing wholesale broadband service without a tariff, in late August 2001 SBC Advanced Solutions, Inc. ("SBC-ASI") without warning filed a request for special permission to file its initial Tariff No. 1 on one day's notice and without cost support.

This new tariff substantially altered SBC's rates and terms for its wholesale broadband access service. SBC's request failed to offer any sufficient public interest basis for rushing through these tariff modifications on one day's notice without cost support, or to identify any adverse consequences if its waiver request had been denied and the normal regulations applied. Unfortunately, before most of SBC's Broadband Services Provider customers were aware of this filing, the Commission granted permission and the tariff was filed on September 7, 2001. Having succeeded at raising rates by 15% without filing any cost support, SBC-ASI has subsequently proceeded to seek special permission for all of its tariff modifications, whether routine or substantial. Most recently, on February 25, 2002, SBC-ASI requested special permission so that it could file on one day's notice and without cost support not only additional substantive rate changes,²⁵ but also to slip in to its service description provisions that limit customers to the use of PPPoE architecture in Ameritech territory.²⁶ As discussed above, PPPoE is a subject of tremendous importance, and should not have been permitted to be included in SBC-ASI's tariff without the opportunity for review. DIRECTV Broadband learned of SBC's request on February 26 and started preparation of an opposition, but before it could be filed the Commission granted SBC-ASI's waiver request.

The Commission's grant of these special permissions severely impair DIRECTV Broadband's ability to exercise its rights to review and, if warranted, object to SBC-ASI's proposed tariff changes. Once the tariff is effective, it is conferred a presumption of reasonableness. Therefore, the Commission should grant waivers of the dominant carrier

²⁵ While SBC-ASI characterized its modifications as mere corrections, the fact remains that the underlying rates in the tariff have never been justified through cost support.

²⁶ SBC Advanced Solutions, Inc., 2nd Amended Application No. 6, Request for Special Permission (February 25, 2002).

regulations, if at all, only in extraordinary circumstances, and only when it is absolutely clear that there is no adverse change in the proposed tariff modifications.

The Commission could easily remedy the problem of assuring that affected broadband retailers are made aware of proposed tariff changes. Dominant providers of broadband access services should be required to serve ISP and Broadband Services Provider customers in advance with copies or a notice of proposed tariff modifications and requests for special permission related to planned tariff filings. Alternatively, to further minimize the regulatory burden, ILECs could be required to allow customers to register electronic mail addresses with the ILEC, to which the ILEC would send a message providing notification that it had filed on that day or was about to file.

A direct notice requirement is important only with respect to dominant carriers. In competitive markets, carriers consider carefully the interests and preferences of their customers before implementing changes to their tariffed rates and services. As one of the primary purposes of dominant carrier regulation is to empower customers to seek Commission protection from implementation unreasonable rates and charges, the Commission should adopt simple notice requirements to assure that this public interest objective is not subverted.

VII. Conclusion

The ILECs' dominance of the wholesale broadband market is as strong as ever, and dominant carrier regulation remains necessary to safeguard competition and consumer choice. Release the ILECs from Commission oversight places at risk the Broadband Services enjoyed by half a million consumers served by the independent providers. It would not be accurate to conclude that moving half a million consumers between modes of Last Mile connectivity can be accomplished without creating a horrendous situation, both for companies forced to change and for the consumers themselves. Nor can it be fairly inferred that, among other things, eliminating

Commission oversight of the terms and conditions under which Last Mile Connectivity is made available to independent Broadband Services Providers would not have the same impact as eliminating its availability as a Last Mile option. The examples provided in this document of SBC's attempts to alter wholesale terms and conditions in fundamental ways that would harm consumers and competitors should provide fair warning of what at least one ILEC will do once FCC oversight is eliminated.

Broadband Services Providers such as DIRECTV Broadband have invested tens of millions of dollars and years of effort specifically to develop the operating, ordering, provisioning, billing and customer support systems that integrate with existing carriers. In the case of DIRECTV Broadband, this includes integrating the deployment across nine last-mile carriers, eight of which are the ILECs' regional entities. It is no simple matter for any Broadband Services Provider to change Last Mile carriers, and it would represent another order of magnitude in disruption and loss of investment to change the mode of Last Mile Connectivity. No one can say with specificity what will happen if the Commission decides to re-classify the ILECs as non-dominant carriers and to end its oversight of such things as changes to applicable tariffs, but it will represent a fundamental change in the dynamics between supplier and purchaser under which the Last Mile Connectivity market was established, and no one can

reasonably say this will improve the ILECs' conduct, reduce the price of Last Mile Connectivity, or improve the quality of the ILEC product on which many Broadband Services Providers rely.

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